DOCKET FILE COPY ORIGINAL

NATIONAL ASSOCIATION OF THE DEAF

814 THAYER AVENUE • SILVER SPRING, MARYLAND • 20910-4500
HEADQUARTERS: 301-587-1788 VOICE* 301-587-1789 TTY • 301-587-1791 FAX
BOOKSTORE: 301-587-6282 VOICE* 301-587-6283 TTY • 301-587-4873 FAX

RECEIVED

AUG 14 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 14, 1998

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Implementation of Section 255 of the Telecommunications Act of 1996, Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, WT Dkt. No. 96-198

Dear Ms. Salas:

Enclosed please find one original and five copies of Reply Comments of the National Association of the Deaf and the Consumer Action Network in the above captioned docket,

Sincerely,

Karen Peltz Strauss

Karen Peltz Strauss
Counsel for

National Association of the Deaf
Consumer Action Network

Enclosures

No. of Copies rec'd 0+5
List A B C D E

ORIGINAL

Before the
FEDERAL COMMIJNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 255 of the Telecommunications Act of 1996	)	
	)	WT Docket No. 96-198
Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment By Persons with Disabilities	)	

REPLY COMMENTS OF
TEE NATIONAL ASSOCIATION OF TEE DEAF
AND THE CONSUMER ACTION NETWORK

National Association of the Deaf
Consumer Action Network

By counsel:

Karen Peltz Strauss
Legal Counsel for Telecommunications Policy
National Association of the Deaf
814 Thayer Avenue
Silver Spring, MD 20910-4500
(301) 587-1788 Voice
(301) 587-1789 TTY

August 14, 1998

TABLE OF CONTENTS

SUMMARY

The National Association of the Deaf and the Consumer Action Network (NAD et. al.) are pleased to see the inroads that a few telecommunications companies have made in their design and development processes since the passage of Section 255. Unfortunately, many companies still take the position that Section 255 is an overly burdensome statute, and that the market should be left to its own devices to provide access to people with disabilities. The very need for Section 255 and the many telecommunications access statutes before it, however, demonstrate that the market has historically failed to respond to access needs, and that FCC regulations are needed to successfully guide the implementation of Section 25 5.

Contrary to the repeated assertions of many industry representatives responding in this proceeding, consumers to do not expect that every product will be accessible to every disability or that industry should be expected to create unwieldy products that are not marketable to anyone. Rather, the ultimate goal of Section 255 is to maximize telecommunications accessibility and consumer choice to the extent readily achievable. The Access Board has determined that the best way to achieve this goal is through an approach that requires consideration of access in each product. This approach assures that where readily achievable solutions can be incorporated into a product, companies will not overlook those solutions.

Many companies have urged the Commission to reject a product-by-product approach in favor of one that considers access features across product lines. While we believe that a product-by-product analysis is still the best method of achieving universal design, accessibility may be achieved within some larger companies if these companies can provide accessible products which are equivalent in function, features, price, quality, and availability to other products in their

product lines. NAD et. al. believes that the FCC, industry, and consumers must clearly define 'product line" before this approach is permitted. We also urge that companies utilizing a product-line approach have in place (1) an access plan which documents the manner in which they will achieve accessibility, and (2) clear and distinct mechanisms for ascertaining access needs during the early stages of product design and development. Finally, companies utilizing this approach must be required to upgrade their accessible products as other products in their product lines incorporate new technological innovations.

Under disability law, it is expected that at least some of the costs of providing access may be borne by the covered entity, to the extent that the entity is financially able to bear those costs. While these costs may be spread over a wide consumer base, they may not be passed on only to consumers with disabilities. Additionally, companies covered by Section 255 may not apply the costs of providing access for one disability group to its obligations to provide access for another type of disability.

The convergence of various technologies will make distinguishing information services from other types of telecommunications nearly impossible in the coming century. As the lines between these services blur, we urge the Commission not to create a definition of telecommunications services in its Section 255 rules which will create unneeded fragmentation and result in additional telecommunications barriers for people with disabilities.

The NAD et. al. believe that a cooperative approach is preferable to a contentious one when trying to resolve telecommunications access questions. Over the years, the NAD has been an active participant of a number of industry-consumer forums, including the FCC's negotiated rulemaking on hearing aid compatibility, the TAAC (through its participation in the Council of

Organizational Representatives), and the existing TTY forum (a forum working on solutions for TTY compatibility with wireless services). We encourage the FCC to develop mechanisms such as these in its ongoing implementation of Section 255. We further urge reliance on consensus industry groups, such as the Association of Access Engineering Specialists, to offer assistance in resolving access problems.

In the interests of avoiding lengthy and expensive legal battles, we support a longer time period for responses during the fast track; if a longer period is provided, consumers and industry may have sufficient time in which to resolve many of their access questions. Because we do believe that the fast track already offers a non-adversarial period in which consumers and industry may "work out their problems," and because consumers will frequently need assistance in ascertaining the source of their access problem, we oppose a requirement for consumers to contact companies directly before they may go to the FCC. We also urge thorough training of FCC staff who will be handling fast track inquiries and complaints to facilitate complaint resolution.

The NAD et. al. proposes a non-restrictive standing requirement that will permit individuals or entities who are aggrieved and individuals or organizations acting on behalf of those who are aggrieved to bring FCC complaints. We oppose time limits on the filing of initial complaints, although we believe that a six month period for the filing of formal complaints, to commence at the completion of the informal period or upon a break down in ADR negotiations, would be reasonable.

Finally, although some telecommunications companies have expressed frustration with requirements for TTY compatibility, until such time that an alternative means of achieving

telecommunications access is widely available and affordable for deaf, hard of hearing, and speech disabled users, these compatibility requirements must remain in place.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 255 of the	)	
Telecommunications Act of 1996	)	
	)	WT Docket No. 96-198
Access to Telecommunications Services,	)	
Telecommunications Equipment, and	)	
Customer Premises Equipment	)	
By Persons with Disabilities	)	

REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF THE DEAF
AND THE CONSUMER ACTION NETWORK

I. Introduction

The National Association of the Deaf and the Consumer Action Network (collectively "NAD et. al.") submit these reply comments in the above captioned proceeding on the implementation of Section 255. The NAD submitted comments during the initial phase of this proceeding. The Consumer Action Network (CAN) now joins the NAD in these reply comments. CAN is a coalition of national organizations of, by, and for deaf and hard of hearing people, that seek to protect and expand the rights of deaf and hard of hearing persons in education, employment, telecommunications, technology, health care, and community life. [1]

[1] See Attachment A for a complete list of CAN membership organizations.

II. Market Forces Alone will be Insufficient to Ensure Telecommunications Access

NAD et. al. was pleased to see the number of companies that have expressed their commitment to achieving access to telecommunications services and products by people with disabilities. The comments in this proceeding show that since the passage of Section 255, a number of companies have initiated efforts to incorporate access during the design and development stages of their product and service deployment; these efforts offer testimony that Section 255's goals are in fact attainable. Some of these companies, such as SBC Communications Inc. (SBC) and Bell Atlantic, have adopted Universal Design Policies requiring that their products and services be designed in a manner that makes them accessible "to the broadest range of consumers, including individuals with disabilities . . ." SBC at 2; Bell Atlantic at 1-2.[2] Similarly, a division of Siemens Business Communication Systems, Inc. (Siemens) reports that it has instituted a process of incorporating accessibility planning "with every new product development project." Siemens at 2.

Still other companies have established comprehensive training programs on access needs for their employees. Motorola, for example, reports that it has initiated a training program for, among others, its associates in engineering, marketing, and customer service. Motorola at 2-3. The company also notes the inclusion of customers with disabilities in its product trials and research, id. at 3, and its initiation of a "'human factors research effort . . . in cooperation with several organizations which advocate for and serve persons with disabilities." Id. at 4.

[2] Bell Atlantic notes that its Universal Design Principles already go beyond the requirements of Section 255, in that they address existing, as well as new products and services. Bell Atlantic at 2. Since 1993, SBC has had ongoing and successful outreach efforts to learn about the access

Footnote cont'd on next page

The very existence of these various measures demonstrate that awareness of the need to consider access by people with disabilities is, for the first time in our nation's history, making its way to the executive offices of our nation's most prominent telecommunications companies. This awareness has come about, for the most part, as a result of - not coincidentally with - the passage of Section 255. Although various industry commenters in this proceeding have suggested that market and competitive forces have been and will continue to be sufficient to respond to the access needs of people with disabilities,[3] virtually all consumers agree that the very enactment of Section 255, coupled with the "consistent and unanimous call for regulations by the disability community," has been a "'response to the historic failure of industry to consider the needs of individuals with disabilities in the design of telecommunications products and services." American Council of the Blind (ACB) at 2; See also Telecommunications for the Deaf (TDI) at 3; United Cerebral Palsy Associations (UCPA) at 9-10. Indeed, until the passage of Section 255, there was little recognition that a market for accessible products and services even existed. See National Council on Disability (NCD) at 21; California Foundation for Independent Living Centers at 2.

While it is encouraging that at least some companies have finally begun to recognize that designing products with disability access in mind can be "economically rewarding," Personal

---

needs of consumers with disabilities through its Advisory Croup for People with Disabilities, one of the few groups which existed prior to Section 255. SBC at 1.

[3] See e.g., Consumer Electronics Manufacturers Association (CEMA) at 13 ("In the past, competition has responded to demand created by disabled users of telecommunications and customer-premises equipment); AirTouch Communications, Inc. at 6 ("To the extent that service providers have competitive incentives to meet the needs of disabled customers, they will have strong marketplace incentives to make such [services] more accessible."); Telecommunications Industry Association (TIA) at 5 (The existence of products that are accessible is "'inconsistent with the notion that there has been a significant failure of the marketplace to make telecommunications equipment and CPE accessible. . .")

Communications Industry Association (PCIA) at 6, it is far from clear that the majority of companies in the telecommunications industry take this position. This is evidenced, for example, by the extensive support by telecommunications manufacturers for consideration of "opportunity costs" in determining whether accessibility is readily achievable. For example, concerns expressed by TIA that the "[t]ime and money spent developing accessibility features are necessarily diverted from other innovation" (TIA at 46) - concerns that were shared by a number of companies - reflect a basic misunderstanding about the rewards that accessible products can bring, not just for people with disabilities, but for all consumers, and for society at large.[4]

As we noted in our earlier comments, it is virtually impossible to calculate what can only be characterized as 'highly subjective" opportunity costs. We agree with UCPA that every penny could be considered an opportunity cost if a company assumes that access efforts take engineers away from other projects. UCPA at 10. Of course, we all know this to be untrue, as is evidenced by the widespread acceptance and use of products which happen to be accessible, products such as speaker phones, vibrating pagers, alphanumeric pagers, hands-free dialing, memory dialing, and caller ID with talking output. Moreover, we agree with TDI that where opportunity costs are considered, the costs of "in-opportunity" - i.e., the costs to society of creating an inaccessible product - must also be taken into consideration. TDI at 18. These costs are often quite high, as the failure to offer accessible products can and has seriously impeded the

[4] In contrast, SBC notes that its Universal Design Policy, by seeking to design products "so they are usable by the broadest possible audience," seeks to avoid the situation in which "accessibility for one constituency means the loss of accessibility to another." SBC at 12.

ability of individuals with disabilities to enjoy employment, educational, and recreational opportunities. [5]

III. The Goal of Section 255 is Maximum Telecommunications Access and Consumer Choice

A number, if not most, of the telecommunications providers and manufacturers responding to the Federal Communications Commission's (Commission or FCC) Notice of Proposed Rulemaking (NPRM) have urged the Commission to adopt an approach that requires access across a company's product line, rather than for each of the company's products. See e.g., TIA at 10 et. seq.; Motorola at 6 et. seq.; Bellsouth at 12. These companies urge that universal access cannot be achieved without much difficulty or expense, Motorola at 8, and that a product line approach will ultimately increase the overall accessibility of a company's offerings. Id. at 11,18; Bellsouth at 12. Some of these companies argue that if the product-by-product approach is adopted, the universe of consumers with disabilities will unflinchingly demand that *every* product meet every access specification, and that endless numbers of "piecemeal" complaints will be filed against noncompliant companies "over and over again." TIA at 15.

The deficiency in the above argument lies in its mistaken premise that consumers expect every product to be accessible to every disabiity. As early on as the discussions within the Telecommunications Access Advisory Committee (TAX), consumers accepted the proposition that it will not be possible to make every single product accessible for every single disability. To

[5] The President's Committee on Employment of People with Disabilities has provided the Commission with extensive information on the high unemployment rate of individuals with disabilities. According to PCEPD, only 52.3% of all people with disabilities are employed, compared to 82.1% of the general working age population. PCEPD at 2. This number is sure to decrease even further if people with disabilities are denied access to the information technologies upon which much of the employment sector is becoming dependent.

dispel any more misconceptions about this matter, we wish to state that it is not in our interests to require carriers or manufacturers to create products or services that are not marketable to anyone. See Cellular Telecommunications Industry Association (CTIA) at 9. It is not in our interests to discourage or impede innovation, see CTIA at **13,** as it is technological innovation which will ultimately create products that facilitate the participation of people with disabilities into all walks of our society. It is not in our interests to diminish access for one disability group in exchange for another disability group, as this would defeat a fundamental purpose of Section 255. See e.g., GTE at 7. Nor is it in our interests to create products that are too big, or too expensive, or which have shorter battery lives, or which make products less desirable for consumers, whether or not those consumers are disabled. See generally Motorola at 1 3-14.[6] For example, it is not in our interests to require a portable, compact wireless product providing text access to become so burdensome as to not be usable for anyone. We understand that it may not be feasible to incorporate all access features into every portable or wireless product. Such a product would likely become unwieldy, and defeat the very purposes for which it was originally conceived.

[6] Motorola offers ***the*** example of its ***Pagewriter*** TM 2000. Motorola expresses concern that if it is forced to consider every access feature contained in the Access Board guidelines, it may be required to incorporate into this product a zoom feature for people who are blind or have low vision, even if a readily achievable analysis precludes the possibility of making the keypad of this product accessible to these individuals. Section 255 would not dictate so incongruous a result. Each access requirement contained in the Access Board guidelines cannot be looked at in isolation. Rather each must be considered in a manner designed to achieve overall accessibility by people with disabilities. Indeed, it is for this very reason, that TIA's definition of accessibility will also be unworkable. That definition would permit telecommunications equipment and CPE to be deemed accessible so long as it enhances the ability of a person with a disability to use the telecommunications equipment or CPE by incorporating ***at least one of the access features*** (to the extent readily achievable). TIA at 3 2. While incorporation of one feature may "enhance" access, it still may not enable an individual to actually use a piece of equipment. If, as in Motorola's
Footnote cont'd on next page

Rather, the overarching goal of the disability community is to achieve greater access and choice in telecommunications products. Section 255 requires that where it is readily achievable to incorporate an access feature into a product or service, there is a requirement to include that access feature in the product or service. Having studied this issue extensively, the Access Board concluded that analyzing the extent to which access features can be incorporated must be done for each product. Were this not required, then access features which might entail only minimal expense and difficulty might be ignored during a product's design stages. The result, of course, would again leave consumers without access, a result not intended by Congress when it passed Section 255.

Motorola proposes that compliance with Section 255 be achieved through the provision of "a range of functionally equivalent, comparably priced products that are accessible." Motorola at 10-l 1. As discussed further below, there may be a limited range of industry settings in which this approach may achieve the goals of Section 25 5. At this point in time, however, we do have several reservations about accepting a product-line approach on an industry-wide basis.

First, a product-line approach assumes that there will be a variety of products within a company's line of products that can offer varying types of access. But this assumption only holds true for the larger, if not the very largest, members of the telecommunications industry. Not all companies will have a product line that is large enough to offer an array of accessible choices to consumers with varying disabilities.

---

example, the product would remain largely inaccessible - here to blind people even with the zoom feature - there would be little point to incorporating that feature. Motorola at 16-17.

Second, a product-line approach may send the message to some manufacturers that they may pick and choose which of their products should be accessible. This approach could result in allowing these companies to exclude - for internal reasons - certain products which may be particularly desirable among certain educational institutions or employers, even though it may have been readily achievable to incorporate certain forms of access into those products.

Third, a product-line approach may inappropriately suggest to companies that so long as they make some effort to consider access in some of their products, they need not consider it at *all* in their other products. For example, the Multimedia Telecommunications Association (MMTA) urges that so long as a manufacturer has made "a good faith effort to consider accessibility issues in the design of some *products*" it should not be considered to have violated 255. MMTA at 5 (emphasis added).[7] Such an approach would result in virtually ignoring consideration of access needs in a considerable, if not a majority of a company's products.

Finally, some companies seem to perceive a product-line approach as allowing consideration of the existence of other accessible products on the market - i.e., those not manufactured by the company in question - in determinations as to whether that particular company is in compliance with Section 25 5.[8] This is not permissible under Section 255; nor does

[7] MMTA goes on to argue that a manufacturer should be found to have violated Section 255 only if the manufacturer's "pattern of behavior demonstrates that it has made 'no meaningful effort' to consider accessibility. Id. Later on in its comments MMTA rejects outright consideration of 100% of possible access improvements, and expresses concerns about considering "even a majority of the universe of possible access improvements." MMTA at 9. It is these types of statements, which would undermine the mandates of Section 255, that give us pause in accepting a product-line approach.

[8] See e.g., CEMA at 13; Conxus Communications at 4; Information Technology Industry Council (ITI) at 19. It is interesting that IT1 cites, as support for the proposition that universal access requirements are not required, the Commissions regulations on hearing aid compatibility (HAC).
Footnote cont'd on next page

Section 255 permit a manufacturer to refer consumers to another manufacturer's products or services. See TDI at 7. One needs only to consider such referrals in the ADA context to understand the absurdity of such an approach. Suppose, for example, that Restaurant A on Main Street provides a ramp into its restaurant. Of course, Restaurant B located down the street would not be permitted to tell a patron unable to gain access to its premises to go back to Restaurant A, even if both restaurants provided foods of the same nationality. So long as providing a ramp or similar access to Restaurant B is readily achievable, the ADA would require access to both restaurants. Similarly, the fact that a competitor offers a similar product which is accessible does not relieve a company from making its own products accessible.

Although analyzing each product for access is the preferred means of achieving accessibility, the FCC has acknowledged that there may be situations where it is reasonable for "informed product-development decision[s] to take into account the accessibility features of other functionally similar products the provider offers, provided it can be demonstrated that such a "product line" analysis increases the overall accessibility of the provider's offerings." NPRM

ITI chose to quote a 1988 FCC ruling in which the Commission concluded that "it [did] not appear that mandatory universal compatibility would serve the public interest, " ITI at 18; n.26, citing ***Access to Telecommunications Equipment and Services by the Hearing Impaired and Other Disabled Persons, Notice*** of Proposed Rulemaking and Further Notice of Inquiry, 3 FCC Rcd 1982 ¶40. This 1988 Order has been superseded by a 1996 Order which, in fact, requires nearly universal HAC in wireline phones. ***In the Matter of Access to Telecommunications Equipment and Services by Persons with Disabilities,*** Report and Order, FCC 96-285, CC Dkt No. 87-124 (July 3, 1996) ("[W]e amend our rules to provide that, eventually, virtually all wireline telephones in workplaces, confined settings, and hotels and motels must be hearing aid compatible"). In addition, the Hearing Aid Compatibility Act of 1988 has required all wireline phones manufactured or imported into the United States since August of 1989 to be hearing aid compatible. 47 U.S.C. §710 (1988). Thus, after deliberations and proceedings which spanned well over a decade (since the FCC's first rules on HAC in 1983), the Commission did in fact

Footnote cont'd on next page

¶ 170. This type of product line approach may be workable, so long as (1) it sends the clear and distinct message that it is intended to offer manufacturers and providers the ***means by which to maximize accessibility*** through the provision of the widest possible range of accessibility options, but ***not the means of evading Section 255's obligations,*** and (2) the FCC clearly defines - with the input of both industry and consumer representatives - what constitutes a product line.[9] A clear and agreed-upon definition of "product line" is critical to achieving consumer acceptance of this approach. In addition, the NAD et. al. proposes that companies that wish to satisfy Section 255 by increasing the overall accessibility of its offerings through a product-line approach should be permitted to do so only where they meet the following conditions:

First, to the extent readily achievable, such companies must offer products or services that are truly equivalent with respect to the features, functions, quality, price, and availability of other products in those product lines. Consumers do not want to be offered only the most feature-rich or feature-poor products available in a product line. Nor do they wish access to only the most expensive products or only those which may be on the lower end of the company's quality standards. Additionally, consumers to not want to have to "special order" products designated as accessible. Although manufacturers may not always have direct control over which products will be carried by retailers, accessible products should be marketed and distributed in the same manner

---

conclude that a universal requirement for HAC phones was needed to achieve full and equal access by people with hearing disabilities.

[9] In an effort to understand the position of manufacturers on this point, other consumer organizations as well have recognized that "at times it may not be feasible to incorporate all potential access features into one product," and that "it may be reasonable to consider products 'functionally similar' if they provide similar features and functions and are close in price." TDI at 7; Campaign for Telecommunications Access (Campaign) at 14 ("One should be willing to accept some [products] as not accessible if others truly are").

as are other products in the product line. Finally, we agree with the National Council on Disability that the FCC should require companies to provide comparable promotional offers, see also TDI at 7-8, comparable warranty coverage, and comparable "placement and positioning in the market." NCD at 34-35.

Second, companies must ensure that as products in a product line are upgraded, functionally equivalent upgrades will be incorporated in the accessible products contained within that line. Consumers wish to avoid a situation where, as product improvements are made to part of a product line, these improvements are left off those products designed with access in mind.

Third, companies approaching the question of access across a product line should be required to devise a plan for addressing access issues, as proposed in the comments submitted by the American Foundation for the Blind (AFB). AFB at 4-5. Such plan should provide documentation of the manner in which the company intends to incorporate accessibility considerations in its design development, and fabrication stages. Such plan should further express the intent and commitment of the company (to the extent readily achievable) to provide accessible products that are similar in terms of functions, features, price, quality, and availability to those products available in its general offerings. See generally Motorola at 23-24 (Section 255 should permit manufacturers 'to provide a representative sample of accessible products, to the extent 'readily achievable' that would provide disabled consumers with the same range of basic choices as non-disabled consumers, such as telecommunications functions, quality and cost."); TIA at 12 ("Manufacturers should be allowed to provide a range of "functionally equivalent, comparably priced products that are accessible.")

It is interesting to note that at least one manufacturer who supports a product line approach raises concerns about "calling attention to specific access features in isolation from a manufacturer's overall system for accessibility" Siemens at 6. This statement presumes that the manufacturer will, in fact have a "'system for accessibility" in place. The purpose of requiring such an accessibility plan would be to ensure that where products are not individually considered for accessibility, there is in fact a system by which accessibility will be incorporated into product offerings on a thorough and consistent basis.

Finally, companies utilizing a product-line approach should have in place clear and distinct mechanisms for the consideration of access needs during the design and early development stages of their products. The purpose of this would be to ensure that in making determinations about the placement of access features in its products, the company has a full and complete understanding of access needs. To meet this end, the company should be required to:

- provide training to its employees on access needs and features
- include people with disabilities in marketing research
- include people with disabilities in product trials and pilot demonstrations
- validate access solutions through testing with individuals with disabilities

In sum, a company that considers access across its product lines should be found in compliance with Section 255 only if it truly offers products or services that are equivalent with respect to the features, functions, quality, price, and availability of other products in its product lines. Again, we urge that a company should only be permitted to utilize a product line analysis where, as the FCC *has* indicated, this would ***"increase[] the overall accessibility of the provider's offerings."*** NPRM at ¶ 170 (emphasis added). We reiterate that while certain very large companies that offer a vast array of consumer products may in fact be able to meet this test under

the above conditions, we remain highly skeptical about the use of this approach with smaller companies that offer only a select group of products.

IV. Added Accessibility Features Cannot be Presumed to Result in Fundamental Alterations to Products and Services

A number of companies have suggested that access need not be incorporated into a product or service if doing so would fundamentally alter the nature of the product or service. TIA at 30-31, 47; Motorola at 39. We are concerned about the way in which a defense of fundamental alteration will be defined. If this concept is adopted by the Commission, we wish to ensure that access features which offer alternative input and output functions are not automatically defined as fundamentally altering a product. For example, while doubling the size of a portable wireless handset might fundamentally alter the nature of the product, adding an access feature that does not substantially change the basic size, functions, or features of the product would not fall into this category. Thus, slight increases in size - e.g., caused by increased requirements for power or memory capacity, Motorola at 32, may or may not constitute a fundamental alteration, depending on the original siie of the product. If insignificant, such increases may not even be noticed by the consumers marketed for that product.

Both Motorola and TIA suggest as well that the inclusion of accessibility features that increase the price of the product beyond that which the target market is willing to pay should not be required under the Commission's rules. TIA at 49; Motorola at 39. The NAD et. al. again understands concerns about prohibitive costs that may turn away consumers. But minor increases in cost that are likely to go unnoticed by the public should not be considered fundamental alterations. For example, inclusion of the decoder chip, at the time that Congress was considering legislation requiring the manufacture of all televisions with this chip, was expected to be around

$5.00 per television set. Congress determined that this would not be enough of a price increase to make a difference in television sales; indeed inclusion of the chip would offer so many advantages to American households that its costs were seen as negligible. In practice, these costs were ultimately incorporated in the overall costs of manufacturing televisions, and consumers never actually saw any price increase when purchasing their television sets.

V. Accessibility Costs Must be Managed in a Non-discriminatory Fashion.

The NAD et. al. does have concerns about companies burdening only consumers with disabilities with the costs of providing access. Our concerns stem from the insistence by many industry parties to this proceeding that they should not have to implement any accessibility features unless they can recover the costs of providing those features. United States Telephone Association (USTA) at 9[10]; CEMA at 11; ITI at 3 1. Should these companies seek to recover their costs by attaching excessive costs only to their accessible products, consumers with disabilities will be faced with discriminatory pricing. The FCC should make clear in its final rules that pricing policies of this sort will not be tolerated.

Section 255 follows a long line of disability access laws. None of these laws permit the costs of providing access to be borne only by the consumers for whom the laws were intended to protect. Moreover, under established disability law, it is expected that at least some of the cost of providing access may be borne by the covered entity, to the extent that the entity is financially able to bear those costs. Indeed, this is the very essence of the readily achievable standard.

[10] It is interesting that USTA takes this position, because it acknowledges that it already has other obligations for which it is not allowed to recover costs. USTA at 10.

Application of some laws mandating access by people with disabilities have successfully utiliid an approach that spreads the costs of providing access over a wide population, significantly reducing the impact of these costs on covered entities or on any one market. For example, neither telephone companies nor relay users pay the several dollars it costs to make each relay phone call. Rather, all telephone subscribers pay an additional few cents on their monthly bills to cover these costs.[11] Similar principles should apply to products and services covered by Section 255. Indeed, at least one major telecommunications provider, SBC, has explained that its method of redistributing the cost of providing access substantially eliminates the issue of cost recovery. Under SBC's universal design policy, "if the feature is incorporated into a service which is used by the general population – which should happen in many if not most instances – the costs would be spread over the entire population of users." SBC at 12.

Another issue related to the costs of providing access - raised by Motorola and TIA - needs to be addressed here. Both Motorola and TIA quote the U.S. Department of Justice (DOJ) as interpreting the Americans with Disabilities Act (ADA) to allow consideration of the "cost of other barrier removal actions as one factor in determining whether a measure is 'readily achievable.'[12] It is not clear whether these companies are suggesting that the costs of removing barriers for one disability may be considered in a readily achievable analysis for removing barriers

[11] The Campaign for Telecommunications Access points out a siiar principle is applied with respect to telephone subscribers that live far from central offlces. Rather than charge these individuals the full cost of carrying their calls, the costs of providing this rural telecommunications service are spread over a large population base. Campaign at 15; see also TDI at 2 1 (suggesting that the costs of providing accessible features be borne by all consumers using the product or service in question).

[12] TIA at 30, 45, citing DOJ Preamble, 28 C.F.R. part 36, App. B, commenting on Section 36.104; see also Motorola at 36.

for a different disability. Taken to its logical conclusion, this theory would permit, for example, the costs expended to remove barriers for people with cognitive disabilities to be considered in determining whether it is readily achievable to eliminate barriers for people who are deaf or blind. Certainly Congress could not have intended to permit a company to consider the costs of providing access for one disability in meeting its Section 255 obligations to provide access by persons with other disabilities.

VI. The Commission's Definition of Telecommunications Services Should Not Create Additional Barriers for People with Disabilities

In its initial comments, the NAD explained why the definition of telecommunications adopted for Section 255 needs to be one that will meet the purposes and achieve the goals of Section 255. Our conclusions are buttressed by other parties to this proceeding who agree that the drafters of Section 255 could hardly have intended to exclude people with disabilities from enjoying emerging telecommunications technologies. The Trace Research and Development Center (Trace), for example, explained how, in the future, it will be very difficult to separate hardware from software or service functions, and that there will be a seamless continuum between various telecommunications technologies. Trace at 2. Coverage of some of these functions and not others will result in contusion, as well as an uneven playing field for the various entities that are alternatively covered or exempted from the reach of the Commission's rule. Id.[13] The National Center on Disability, in its comments, also urged the Commission not to "'promote unproductive and unneeded fragmentation . . . in the legal coverage of a system that is becoming

[13] Trace offers the example of a software phone which, although performing the same functions as a hardware phone, might not be covered under the Commission's regulations. Trace at 11.

increasingly seamless and interdependent ." NCD at 15; see also SHHH at 7 (As services merge, the distinctions among enhanced, basic, and adjunct will become "superficial at best.")[14]

The California Public Utilities Commission (CA PUC) has pointed out that the existing FCC categories dividing telecommunications from information services were designed for assigning regulatory treatments and assessments, not functional access for people with disabilities. CA PUC at 3. We agree with their concern that the proposed definitions risk leaving deaf and disabled people without access to many digital communications, which will "inadvertently create roadblocks to the information superhighway." Id. at 4. We again urge the Commission not to create additional barriers for people with disabilities by creating a definition of telecommunications services that excludes most if not all new telecommunications innovations. See also PCEPD at 5 (a broad definition is necessary because digital technologies will impact access to education, entertainment and employment); Delaware Association of the Deaf (Mervin Garretson) at 3; Campaign at 11.

VII. A Cooperative Atmosphere Will be Critical to the Successful Implementation of Section 255.

Many parties to this proceeding have suggested that a cooperative approach is needed to successfully implement Section 255. We agree. Siemens, for example, has asked the FCC to take a leadership role in bringing together manufacturers of CPE, suppliers of adaptive technology, and people with disabiities to achieve consensus solutions, Siemens at 10, and urges reliance on consensus industry standards, and broad-based access engineering organizations, such as the

[14] Even members of the industry acknowledge that the convergence of telecommunications and information technologies is taking place, ITI at 10, and that during the 1990% we have seen considerable progress toward the integration of computer and telephone systems. MMTA at 27.

Association of Access Engineering Specialists (AAES), to develop resolutions to access problems. Id. at 12; see also NCD at 33 (suggesting that AAES could provide technical assistance services). Similarly, Bell Atlantic urges the FCC to establish a forum of representatives from the disabled community, equipment manufacturers, and telecommunications service providers. It sees such a forum as having the capability of resolving issues "that have not yet matured into disputes [to]obviate the need for complaints." Bell Atlantic at 10-l 1. SBC also urges the creation of "an interdisciplinary panel of experts and disability advocates to whom industry-wide complaints could be referred for resolution" SBC at 14. Finally, Gene Bechtel suggests the use of negotiated settlements as a means of resolving conflicts and "dissolving impasses." Bechtel at 5.

We agree that groups such as AAES, which consists of telecommunications engineers, consumer representatives, rehabilitation engineers, and designers of assistive technology, AAES at 4-5, can serve various functions, including the handling of referrals during the fast track process, devising general access and compatibility solutions, and assisting in alternative dispute resolution processes under Section 255. See NPRM §161. We also believe that turning to neutral parties with expertise in accessibility issues will reduce the need for consumer complaints, and thereby reduce the confrontational nature of dispute resolution under Section 255. See also Campaign at 16 (urging a complaint process that is as nonconfiontational as possible.) Such an approach would more likely result in standard interfaces across and among telecommunications products. Finally, we support the FCC creation of a "joint industry/disability advisory panel" to provide leadership in developing consensus solutions, see generally TAAC Report §6.7.5 at 33, and we urge the FCC to hold negotiated rulemakings, where appropriate, for this purpose.